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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS OF TEXAS, AT AUSTIN

Christopher James Holder
Appellant

v.

The State of Texas
Appellee

On Appeal from the 416th District Court of Collin County, Texas, in Cause Nos. 416-80782-2013
The Hon. Chris Oldner, Judge Presiding

BRIEF ON APPEAL

Submitted by:

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Oral Argument Was Not Granted

Identity of Parties and Counsel

Pursuant to Rule 38.1(a), Rules of Appellate Procedure ("Tex.R.App.Pro."), the following is a complete list of the names and addresses of all parties to the trial court's final judgment and their counsel in the trial court, as well as appellate counsel, so the members of the Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case and so the Clerk of the Court may properly notify the parties to the trial court's final judgment or their counsel, if any, of the judgment and all orders of the Court of Appeals.

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Statement of the Case

The following is a brief general statement of the nature of the cause or offense:

> Appellee generally agrees with the recitation of the facts in the merit's brief submitted by the State Prosecuting Attorney's office ("State's Brief on the Merits," pages 2-3) The SPA omits, however, the fact that, at oral argument before this Court on September 27, 2017, counsel for the State conceded that the Court Order at issue in this case did not establish probable cause.

Issues on Which Review was Granted

1. **If the error at trial was in admitting evidence under a non-constitutional rule–TEX. CODE. CRIM. PROC. art. 38.23–shouldn't harm be assessed under the non-constitutional harm standard in TEX. R. APP. P. 44.2(b)?**

2. **If the non-constitutional "substantial rights" standard applies, was the error harmless?**

Note Regarding Abbreviations & Hyperlinks

In this brief, Appellant refers to the Clerk's Record as "CR" followed by the appropriate page: e.g., "(CR 123)." Appellant refers to the Reporter's Record as "RR" followed by the volume, page and line numbers: e.g., "(RR Vol. 3, P. 47, L. 12-15). And, in this brief, Appellant utilizes hyperlinks to cited opinions. Where an opinion was not designated for publication or the published opinion and is not yet available on a free public service, and when possible, the hyperlink will be to the posted opinion on the particular court's website. All other hyperlinks are to a copy of the opinion on the Google Scholar site.

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IN THE COURT OF CRIMINAL APPEALS OF TEXAS, AT AUSTIN

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On Appeal from the 416th District Court of Collin County, Texas, in Cause Nos. 416-80782-2013
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BRIEF ON APPEAL

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, Steven R. Miears, court-appointed attorney of record for Christopher James Holder, Appellant in the above styled and numbered cause, and respectfully files this "Brief on Appeal," and would show the Court:

Statement of Facts

On November 12, 2012, Plano Police Department detective Jeff Rich brought a petition to the home of Judge Mark Rusch. The petition requested an Order authorizing AT&T to release the historical cell phone records, including historical cell-site location information ("CSLI"), associated with Appellant's

cell phone number for October 20, 2012, through November 12, 2012 (RR Vol. 6, PP. 108-109).

The CSLI and historical records information requested would include records on when calls, texts, and data were made and received by the phone, and for how long those communications lasted. The records would show the other phone numbers associated with those communications. Additionally, the records would show when data was transmitted and received by the particular phone.

Importantly for this case, the CSLI records identify the locations of the cell towers that the phone signals were hitting. It is generally accepted that a cell phone's signal will connect with the cell tower which provides the strongest signal. That cell tower is usually the one located closest to the phone. The range and direction of coverage for a cell tower depends upon several factors, but it is limited to a particular geographical area. Testimony establishing the probable range for a cell tower is used to prove the probable presence of a phone within that area at a particular time.

Judge Rusch signed the Order authorizing AT&T to release the records. Rich forwarded the Order to AT&T, but it was rejected. AT&T notified Rich he had to recite in the petition his need for the records was based upon "probable

cause" (RR Vol. 2. P 115). Rich testified at the motion to suppress hearing that, "[i]t was simpler for me to just change the wording and have it re-signed and bother the judge one more time, as opposed to waiting until later in the day, after their counsel had time to look at it and make an assessment" (RR Vol. 2, P. 118). After changing only the phrase "reasonable suspicion" to "probable cause," Rich took the petition back to Judge Rusch, who signed the revised Order (RR Vol. 13, PP. 132-136; State's Exhibits 7A and 7B). AT&T then emailed the records to Rich (RR Vol. 13, PP. 131-132).

In support of the request for the records the petition stated:

> Petitioner has probable cause that the above records or information are relevant to a current, on-going police investigation of the following offense or incident: Death Investigation - Texas PC 19.03
>
> The cellular telephone was used by a possible suspect to communicate with unknown persons and obtaining the locations of the handset will allow investigators to identify if this suspect was in the area at the time of the offense and will provide investigators leads in this case.

State's Petition for Court Order to Obtain Electronic Communication Records (RR Vol. 13, P. 134; State's Exhibit 7B).

Judge Rusch was not provided with any additional information about the investigation. Rich's petition was unsworn. Neither affidavits nor offense reports were presented to the judge, and no record of the *ex parte* meeting between detective Rich and Judge Rusch was made (RR Vol. 2, PP. 120-127).

Appellant's cell phone records and CSLI were used by the State to prove he was in Plano on the date of the homicide;more importantly, that he was in the vicinity of the victim's residence at a time when the State contended the victim was killed. Appellant moved to suppress this evidence. He argued the petition was insufficient under the federal Electronic Communications Privacy Act, and the records were thus inadmissible under Article 38.23, C.Cr.P. The trial court denied the motion (RR Vol. 6, PP. 108-140; RR Vol. 2, PP. 109-140; RR Vol. 3, PP. 8-12; CR 47-56; CR 113-127 (Trial Brief in Support); CR 399 (Trial Court's Ruling).

The State's Points of Error Restated

1. **If the error at trial was in admitting evidence under a non-constitutional rule–TEX. CODE. CRIM. PROC. art. 38.23–shouldn't harm be assessed under the non-constitutional harm standard in TEX. R. APPELLANT. P. 44.2(b)?**

2. **If the non-constitutional "substantial rights" standard applies, was the error harmless.?**

Appellant's Counter Point

The Court of Appeals Used the Proper Analysis and Reached the Correct Result

Relevant Facts

On initial submission to the Court of Appeals, Appellant complained about the trial court's denial of his motion to suppress his cell phone records. On original submission, the Court of Appeals affirmed the judgment of conviction. See ***Holder v. State***, No. 05-15-00818-CR (Tex.App. - Dallas, August 19, 2016)("***Holder I***"). The Court of Criminal Appeals granted review and, while the case was pending, the Supreme Court of the United States decided ***Carpenter v. United States***, 585 U.S. _____ (No. 16-402, June 22, 2018),[1] holding that persons have a reasonable expectation of privacy under the Fourth Amendment

[1] See also 138 S.Ct. 2206.

in cell site location information and, therefore, a search warrant is required to obtain seven or more days of that information. ***Carpenter***, slip op., at 11 (FN3).

The Court of Criminal Appeals reversed the Court of Appeals, concluding that Appellant had a reasonable expectation of privacy under Article I, Section 9 of the Texas Constitution in the twenty-three days of his cell cite location information accessed by the State. ***Holder v. State***, 595 S.W.3d 691, 704 (Tex.Cr.App. 2020)("***Holder II***"). The case was remanded for the Court of Appeals to determine whether Appellant was harmed by the erroneous admission of the cell cite location information. ***Holder II***, 595 S.W.3d at 704. After reviewing the record as a whole, the Court of Appeals determined that the probable impact of the improperly admitted cell site location information was substantial. Finding that the error not harmless, the Court of Appeals reversed the conviction. ***Holder v. State***, No. 05-15-00818-CR (Tex.App. - Dallas; January 21, 2021)("***Holder III***"), slip op., at 2.

Summary of the Appellant's Argument

Admission of direct evidence obtained in violation of the U.S. or Texas Constitution must always be subject to the Constitutional harm analysis. Because the State lacked probable cause, the evidence admitted was direct evidence

obtained in violation of the U.S. and Texas Constitution; and, regardless of which harm analysis applies, Appellant sustained substantial or egregious harm because the evidence was obtained without the required probable cause and, without such evidence, Appellant could not have been linked to the offense of capital murder and would not have been convicted.

Argument & Authorities

I

Harm Should Be and Was Properly Assessed under the Constitutional Harm Standard Set out in Rule 44.2(a), Tex.R.App.Pro.

It is notable that, during the entirety of the proceedings, the State has not claimed that exigent circumstances or some other recognized law enforcement need supported the issuance of the Order involved in this case. ***Holder III***, slip op., at 2. It is further notable that, during the previous proceedings, the State conceded that the petition seeking Appellant's cell site location information did not set forth sufficient facts to establish probable cause. ***Holder II***, 595 S.W.3d at 704 (FN26)("Oral Arg., Holder v. State, PD-1269-16, at 38:54-39:40"). Thus, the case involves a situation in which representatives of the State of Texas proceeded to obtain Appellant's cell phone records without probable cause and with no exigent circumstances (or other exception to the warrant requirement)

present. Yet today, the State wants the Court to say that Appellant's constitutional rights were not involved.

The case law simply does not support the State's position. Most relevant to the question is ***Dixon v. State***, 595 S.W.3d 216 (Tex.Cr.App. 2020). The facts and circumstances of the violation of the defendant's rights in ***Dixon*** are remarkably similar to the violation of the defendant's rights in the instant case

In ***Dixon***, the defendant, a plastic surgeon in Amarillo, was accused of having his friend, David Shepherd, kill his former girlfriend's then current boyfriend ("Sonnier"), who was a physician in Lubbock. David Shepherd killed Sonnier on July 10, 2012. ***Dixon***, 595 S.W.3d at 218. Among its evidence, the State introduced fifty-five pages of CSLI that showed numerous phone calls and text messages between the defendant and Shepard in the months leading up to the murder and on the day of the murder. These records also included cell-site location information, some of which were from the defendant's cell phone provider. CSLI from the defendant's phone showed that he was in Lubbock on the day of the murder, but the State had not obtained a warrant for the CSLI for the defendant's phone. ***Dixon***, 595 S.W.3d at 218.

The Court of Appeals found error and conducted the constitutional harm analysis required by Rule 44.2(a), Tex.R.App.Pro. Determining that it "could not conclude that the error was harmless beyond a reasonable doubt," the Court of Appeals reversed the conviction. ***Dixon***, 595 S.W.3d at 218. On discretionary review, the Court of Criminal Appeals disagreed, holding that any error in the admission of the evidence was harmless. ***Dixon***, 595 S.W.3d at 219. The "CSLI information was not particularly significant in light of the evidence from Shepard's phone." ***Dixon***, 595 S.W.3d at 219.

Most relevant in ***Dixon***, however, is that the Court of Criminal Appeals did not disturb the Court of Appeals' decision to analyze the harm under the Rule 44.2(a) constitutional harm analysis. Although Judge Hervey disagreed, her concurring opinion solidifies the belief that the improper use of CSLI information is a direct violation of the Constitution of the United States, and that the proper harm analysis is under Rule 44.2(a). See ***Dixon***, 595 S.W.3d at 225-226. The sentiments in Judge Hervey's concurrence, however, only make sense where there is no claimed Fourth Amendment violation, but there is a violation of the Art. 38.23 exclusionary rule due to a statutory violation. In ***Dixon***, ***Love v. State***, 543 S.W.3d 835 (Tex.Cr.App. 2016), and the instant case, there is both a

constitutional violation and a violation of the Art. 38.23 exclusionary rule. In the case at bar there is an accepted violation of the Texas Constitution. There is only disagreement as to the standard of harm to be applied.

In ***Carpenter***, the Supreme Court held that people have a reasonable expectation of privacy under the Fourth Amendment in cell site location information and, therefore, a search warrant supported by probable cause is required to obtain seven or more days of that information. The decision in ***Dixon*** was based in part on the Court's earlier decision in ***Love***, and a violation of the Fourth Amendment. Whatever else it stands for, ***Love*** made clear that consistent with ***Riley v. California***, 573 U.S. 373 (2014), cell phone records are protected by the Fourth Amendment. That they are also protected by the Texas Constitution has now been decided by this Court.

The Court in ***Love*** held that cell phone records obtained via a subpoena, rather than a properly issued search warrant, were not admissible. ***Love***, 543 S.W.3d at 844. In ***Dixon*** the error found by the Court of Appeals[2] but held to have been harmless by the Court of Criminal Appeals was the admission of cell phone records that were obtained without probable cause. Similarly, the error

[2] See ***Dixon v. State***, 566 S.W.3d 348 (Tex.App. - Amarillo 2018).

found by this Court was that the records were obtained without a properly issued search warrant or probably cause.

The State desires the entire Court to adopt Judge Hervey's concurring opinion in ***Dixon***, and apply it to Texas constitutional error. To do so would cause grave damage to the Constitution of this State. To do so would emasculate the Texas Constitution by ignoring reality. If the State's, and Judge Hervey's concurring opinion, were adopted, a violation of our Constitution could never be anything but statutory error for purposes of harm, thus whitewashing any such Constitutional violation. Constitutional error is only realized by the admission of the illegally gathered evidence into evidence.

In ***Holder II***, this Court concluded that, as concerns historical cell tower records, our Texas Constitution provides the same protections of privacy as its federal counterpart. However, if the same evidence was obtained in violation of the U.S. Constitution's fourth amendment, according to the State, it is to be treated differently -- with more respect. Under the federal constitution a judgment of conviction or punishment must be reversed unless the appellate court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment. According to the State, the harm from the same

evidence admitted in violation of the Texas Constitution must be disregarded unless it affects substantial rights. To conclude that the right to privacy secured by the legends at the Alamo, Goliad, and San Jacinto was obtained at a lesser price than was garnered by the patriots at Valley Forge is indefensible.

It is clear that Art. 38.23 is an exclusionary clause. In fact, Art. 38.23 is the only exclusionary clause that encompasses constitutional violations (State and Federal) versus a violation of a statute. Judge Hervey's opinion in ***Holder II*** made it clear that a mere statutory violation did not occur: "Here, Article 38.23(a) can be invoked if the search violated Article I, Section 9 because the exclusivity clauses do not apply to constitutional violations." ***Holder II***, 595 S.W.3d at 697 n.12 . Although the illegally obtained evidence is discussed and excluded within and by a statute does not in any way alter the nature of the violation of law committed--that of a constitutional violation. The harm is truly constitutionally based. A plain reading of T.R.A.P 44.2(a) suffices.

The State's reliance upon ***Welchek v. State***, 93 Tex. Crim. 271, 247 S.W. 524 (Tex.Cr.App. 1922), is alarming. ***Welchek***'s interpretation of Article One Section 9 was that:

> We believe that nothing in Section 9, Article 1 of our Constitution, supra, can be invoked to prevent the use in testimony in a criminal

> case of physical facts found on the person or premises of one accused of crime, which are material to the issue in such case, nor to prevent oral testimony of the fact of such finding which transgresses no rule of evidence otherwise pertinent.

Welchek, 93 Tex. Crim. at 280-281, 247 S.W. at 529.

Thus, the ***Welchek*** Court would not agree with this Court in ***Holder II*** that a Texas constitutional violation occurred requiring any suppression of the evidence. Among the other things, this Court's opinion in ***Holder II*** makes clear that ***Welchek***'s interpretation of whether evidence obtained in violation of Article One, Section 9 must be suppressed was wrong. Reliance upon ***Welchek*** adds nothing to the question of what standard of harm applies to such violations.[3]

To hold as the State would have this Court hold would render any inquiry into the scope of the protections afforded by the Texas Constitution immaterial -- no matter how much protection is afforded our citizens by their Constitution, the harm would never be viewed as deriving from the Constitutional violation. Violation of our most precious document would be rewarded. The State argues it would be punished by the higher harm standard, yet cannot explain how the error becomes non-constitutional without legal sophistry.

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[3] In essence, the only question is whether the violation at issue is a "violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America." The answer necessarily provides the framework for the harm analysis.

The State posits that it was only the act of the police officer which violated the Texas Constitution, not the trial court. *See* State's brief at 4. But the constitutional error is not mysteriously transmuted, like gold into lead, to become only a statutory error by its erroneous admission into evidence. Under the State's view, the trial judge could never violate the Texas constitution by admitting the evidence. No objections under the Texas Constitution or arguments that the Texas constitution affords more, less, or the same protections than its federal counterpart need ever be made again. Poppycock.

The constitutional error is not somehow transformed by a trial judge's erroneous decision to admit the illegally seized evidence from a constitutional error to a statutory violation, and the State is only being "punished," if one wishes to label enforcement of constitutional principles as "punishment," and not, as it is, an attempt to require adherence to those principles.

To apply the exclusionary rule to prevent admission of evidence obtained without a properly issued search warrant does not "unfairly" punish the State. Rather, it complies with the "primary purpose" of the exclusionary rule, which

is "deter police activity that could not have been reasonably believed to be lawful by the officers committing the conduct." See ***Drago v. State***, 553 S.W.2d 375, 378 (Tex.Cr.App. 1977).

II

The Court of Appeals' Harm Analysis is Both Appropriate and Accurate

The Court of Appeals concluded that "the probable impact of the improperly admitted cell site location information was great" and could not be categorized as harmless beyond a reasonable doubt. ***Holder III***, slip op., at 17. Besides urging the Court to transform a constitutional violation, and its attendant constitutional harm analysis, the State also urges the Court to find the error was harmless. It is conceded the error was not harmless under Rule 44.2(a).

The State's second question asks whether the error committed by the trial court was "harmless." Appellant suggest that the answer is clearly "no." The State argues that the error was harmless under the "substantial rights" standard - i.e., Rule 44.2(c). Specifically, the State argues that "while the CSLI was one part of the State's case, it did not provide direct evidence of Appellant's guilt."[4] This is, in essence, the same argument offered to but rejected by the Court of Appeals,

[4] State's Brief on the Merits at 19.

"[t]he State responds that the cell site location information was merely one part of a multi-faceted case, and that when appellant's cell site location data is viewed in the context of the State's entire case, it "would not have substantially swayed the jury." ***Holder III***, slip op., at 13.

Under either theory of harm, the facts show the violation affected Appellant's substantial rights and caused Appellant harm. In its original opinion finding the evidence sufficient, the Court of Appeals used over two pages to detail the information received from the unauthorized disclosure of the CSLI. ***Holder I***, slip op. 11-13. The Court then used another page to show how that information had been used to identify and incriminate Appellant. ***Holder I***, slip op. 13-14. The harm is obvious.

Unlike in ***Dixon***, where a conviction was likely even if the defendant's CSLI had not been admitted, it is unlikely that the State would have obtained a conviction if it had not obtained Appellant's CSLI and heavily relied upon it at trial. Without Appellant's CSLI, it is unlikely that the State would have been able to demonstrate involvement in the case by Appellant at the time the State argued the homicide occurred. 13 RR 18-23; 67-69; State's exhibits: 31--64, *See* RR 14 pdf pages 521- 541 (Color Map exhibits from phone records.)

Conclusion

The trial court erred by admitting Appellant's cell phone information in violation of the Fourth Amendment. The Court of Appeals was correct in applying the Rule 44.2(a) constitutional harm analysis, and correct in its determination that the error was not harmless beyond a reasonable doubt. The Court should not undermine the long history of using a stricter "harm" analysis when the error involved is of constitutional dimension, as it is in this case and continue the use of Rule 44.2(a) in such cases: Sea changes bring consequences unintended.

The Court of Appeals used the proper analysis and reached the correct result. Its judgment should be affirmed.

Prayer

WHEREFORE, PREMISES CONSIDERED, Christopher James Holder, Appellee in the above styled and numbered cause respectfully prays that this Honorable Court will review this brief, and, upon submission of the case to the Court, will affirm the judgment of the Court of Appeals.

Respectfully submitted,

/s/ Steven R. Miears

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Statement Regarding Oral Argument

Oral Argument is Waived

Certificate of Compliance and Delivery

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/s/ Steven R. Miears

Steven R. Miears

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